Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INDEX

	Page
Opinions Below	2
Statement of Jurisdiction	2
Statement of the Case	3
Questions Presented	9
Specifications of Errors To Be Urged	11
Reasons For Granting the Writ	12
Argument	12
Conclusion	45
APPENDIX:	
Decision of Court of Appeals Below	18a-24a
Statutes and Rules Involved, Constitutional Provisions, and Legislative History	1a-18a

TABLE OF CITATIONS

CASES:

Amendola v. U.S., (2 Cir.), 17 F. 2d 529	30, 32
American Tobacco Co. v. U.S., 328 U.S. 781	26
Andres v. U.S., 140 U.S. 118; 11 S. Ct. 761	25
Bazzell v. U.S., 187 F. 2d 878	26, 27, 32
Ball v. U.S., 140 U.S. 118; 11 S. Ct. 761	13
Bell v. U.S., 75 S. Ct. 620	42
Blockburger v. U.S., 284 U.S. 299, 304; 52 S. Ct. 180; 76 L. ed. 306	19
Boyd v. U.S., 116 U.S. 8; 8 S. Ct. 524, 532	34, 40
Braverman v. U.S., 317 U.S. 49; 63 S. Ct. 99; 87 L. ed. 23	19
Calavarisi v. U.S., 216 F. 2d 891; cert. granted & rem'd, 75 S. Ct. 522	15
Catrino v. U.S., (9 Cir.), 176 F. 2d 884	19
Chambers v. Florida, 309 U.S. 227; 60 S. Ct. 472; 84 L. ed. 716	43
Cole et al. v. State of Arkansas, 333 U.S. 196; 68 S. Ct. 514	41

Page

Continental Baking Co. et al. v. U.S., 281 F. 2d 137 29
Cook v. U.S., 171 F. 2d 567 (1 Cir.) 39
Couch v. U.S., 235 F. 2d 519 .... 14, 16
Davis v. U.S., 279 F. 2d 577 27
Duggins v. U.S., 240 F. 2d 479 (6 Cir.) 39
Ellerbrake v. U.S., (7 Cir.), 134 F. 2d 683 19
Enfield v. U.S., (8 Cir.), 261 F. 141 27
Fooshee v. U.S., 203 F. 2d 247 (5 Cir.) 39
Gaddis v. U.S., 280 F. 2d 334, 336 20
Gadsen v. U.S., 223 F. 2d 627 14
Gaunt v. U.S., (1 Cir.), 184 F. 2d 284 29
Gavieres v. U.S., 220 U.S. 338; 31 S. Ct. 421; 55 L. ed. 489 19
Gore v. U.S., 357 U.S. 386; 78 S. Ct. 1280 42
Gray v. U.S., 174 F. 2d 919 20
Green v. U.S., 80 S. Ct. 867, memo # 596 15
Green v. U.S., 256 F. 2d 483 15
Green v. U.S., 273 F. 2d 216; affirm. 256 F. 2d 483 15
Herndon v. Lowery, 57 S. Ct. 732, rev'sg Lowery v. Herndon, 186 S.E. 429, 182 Ga. 582 41
Hirsch v. U.S., 100 U.S. 33 .... 19; 37
Holt v. Comm. of Kentucky, 284 F. 2d 395 29
Hudson v. U.S., 229 F. 2d 36 14
Husty v. U.S., 282 U.S. 694 44
In re Oliver, 68 S. Ct. 499, 333 U.S. 257 43
In re Snow, 7 S. Ct. 556 24
Jacobs v. U.S., 24 F. 2d 890, 58 App. D.C. 62 43
Jordan v. U.S.D.C.D.C., 233 F. 2d 362, 98 App. D.C. 160 43
Ladner v. U.S., 358 U.S. 169; 79 S. Ct. 209 .... 37, 42
Lindsey et al. v. State of Washington, 301 U.S. 397; 57 S. Ct. 797 .... 31, 41
Masi v. U.S., 223 F. 2d 132 28
Mesarosh v. U.S., 352 U.S. 1, 77 S. Ct. 8 43
Mixon v. U.S., 214 F. 2d 364 16
Montrose Lumber Co. v. U.S., (10th Cir.), 124 F. 2d 573 19
Nilva v. U.S., 352 U.S. 385 44
Ogull v. U.S., 149 F. Supp. 272 .... 24, 32, 34
Padilla v. U.S., (5 Cir.), 278 F. 2d 188 28
Patterson v. U.S., 2 Wheat. 221; 4 L. ed. 224 20

Page

People v. Nesce, 201 N.Y. 111, 94 N.E. 655 13
Pinkerton v. U.S., 328 U.S. 640; 66 S. Ct. 1180 19
Robinson v. U.S., 143 F. 2d 276 19
Rosenburg v. U.S., 346 U.S. 273 36
Sandroff v. U.S., 174 F. 2d 1014 15
Schwab v. Berggren, 143 U.S. 442 13
Shelton v. U.S. (4 Cir.), 235 F. 2d 951, 954 36
Sibbach v. Wilson, 312 U.S. 1, 61 S. Ct. 422 17
Taylor v. U.S., (7 Cir.), 2 F. 2d 44 26
Taylor v. U.S. No. 16726 (9th Cir.), not yet reported .. 14
Townsend v. Burke, 334 U.S. 736 44
U.S. v. Bazzell, 187 F. 2d 878, cert. den. 72 S. Ct. 73 ..... 26, 27, 32
U.S. v. Beck, (CCA 7), 118 F. 2d 178 30
U.S. v. Berkowitz, 45 F. Supp. 564 36
U.S. v. Bradford, 194 F. 2d 197 (2 Cir.) 39
U.S. v. Carminati, 247 F. 2d 640, cert. den. 78 S. Ct. 150 ..... 7, 19
U.S. v. Carminati, 281 F. 2d 908 ..... 9, 24, 34
U.S. v. Galgano & McKinney, Jr., 181 F. Supp. 143 ... 8
U.S. v. Galgano, McKenney, Jr. and Carminati, 281 F. 2nd. 908 ..... 2, 9
U.S. v. Glasser, (7 Cir.), 116 F. 2d 690 26
U.S. v. Goldman, (DC-Conn.), 28 F. 2d 429 29
U.S. v. Hirsch, 100 U.S. 33, 25 L. ed. 539 ..... 19, 37
U.S. v. Holt, (7 Cir.), 108 F. 2d 365 26
U.S. v. Hutcheson, 312 U.S. 219, 229; 61 S. Ct. 463 ... 26
U.S. v. Hutto, 256 U.S. 524, 528; 41 S. Ct. 541 26
U.S. v. Mayer, 235 U.S. 55 39
U.S. v. McElvain, et al., 272 U.S. 633; 47 S. Ct. 219 37
U.S. v. McKenney, Jr., 181 F. Supp. 143 8
U.S. v. Morgan, 346 U.S. 502 39
U.S. v. Poff, 211 F. 2d 171 25
U.S. v. Rabinowich, 238 U.S. 78; 35 S. Ct. 682 19
U.S. v. Rosenblum, (7 Cir.), 176 F. 2d 329 29
U.S. v. Russano, 257 F. 2d 712 30
Virginia Railway Co. v. System Fed. # 40, 300 U.S., 515, 57 S. Ct. 592 43
Williams v. U.S., 238 F. 2d 215, cert. den. 352 U.S. 1024 ..... 21, 34
Williams v. U.S., 168 U.S. 382, 389; 18 S. Ct. 92, 94 .. 26

STATUTES: Page

Title 18, sec. 371, U.S.C.A. 1, 3, 5, 6, 10, 11, 18, 19, 21, 22, 23, 29, 31, 32, 33, 34, 39, 44
Title 18, sec. 4202, U.S.C.A. 9
Title 21, sec. 173, 174 U.S.C.A. 1, 5, 8, 10, 11, 18, 19, 21, 22, 23, 29, 31, 32, 33, 34
Title 26, sec. 7237 (1954 Code) 1, 19, 21, 28
Title 26, sec. 7237 (a) as amended 5, 6, 10, 19, 21, 22, 28, 32
Title 26, sec. 7237 (e) (d) U.S.C.A. 10, 32, 39
Title 28, sec. 2255 U.S.C.A. 1, 14, 22

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 7, F.R. Cr. Pro. 38
Rule 8, F.R. Cr. Pro. 38
Rule 31 (c) F.R. Cr. Pro. 21
Rule 32 (a) F.R. Cr. Pro. 1, 5, 9, 11, 12, 16, 17, 18, 32
Rule 35, F.R. Cr. Pro. 1, 7, 12, 22
Rule 38 (a) F.R. Cr. Pro. 7
Rule 52(b), F.R. Cr. Pro. 12

U. S. CONSTITUTIONAL AMENDMENTS

FIFTH AMENDMENT 10, 38

SIXTH AMENDMENT 10, 38

Boggs Act 27

Jones-Miller and Harrison Narcotic Acts 23, 24, 27

Legislative History, Narcotics Control Act 1956 37

Narcotic Control Act of 1956 .....5, 8, 9, 10, 11, 27, 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

ANTHONY CARMINATI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your Petitioner Anthony Carminati, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit wherein it affirmed the judgments of the United States District Court for the Southern District of New York denying two motions of the petitioner who (a) sought relief under authority of Title 28 sec. 2255 U.S.C. from an improperly imposed sentence in violation of Rule 32(a) F.R. of Cr. P. and (b) claimed the right to be resentenced under the proper section of the proper law instead of being forced to serve a term of imprisonment imposed under an illegal sentence, basing his prayer on Rule 35 of the F.R. of Cr. P. and/or Title 28 sec. 2255, U.S.C., plus the fact that *all* of the courts below agreed that he had been "convicted upon an indictment charging him with a conspiracy in violation of Title 18 sec. 371 U.S.C. to receive, possess and sell heroin in violation of the federal narcotic laws. 21 U.S.C. secs. 173, 174; 26 U.S.C. secs. 4701, 4703, 4704(a), 4724(c), 4771(a)—but was still illegally sentenced as a violator of Title 21 sec. 174 U.S.C. as amended by the Narcotics Control Act of 1956 which entails more severe penalties and takes away any right or privilege of seeking parole.

Petitioner has been confined since February 14, 1957, 309 days of which were spent at the West Street Federal House of Detention in New York City, for which he has received no credit and since then, up to the present time, is confined in the Federal Penitentiary at Leavenworth, Kansas.

OPINIONS BELOW

On February 18, 1960 the District Court denied the motion on the question of allocution (25 F.R.D. 31) and on April 4, 1960 denied the motion to correct the illegal sentence under Rule 35 F.R.Cr.P. and or under sec. 2255 of Title 28 U.S.C. This two-word opinion is reproduced on page 87 J.A.

Both opinion-orders were affirmed by the Court of Appeals on August 22, 1960 (281 F. 2d 908) (1960) *sub nom. United States* v. *Galgano and Carminati*, and are reproduced on pages 18a-24a of the appendix herein. A petition for rehearing was denied on September 28, 1960 and this Court granted an extension of time within which to file a petition for a writ of certiorari to February 1, 1961 and that extension was further enlarged to and including February 15, 1961.

JURISDICTION

The jurisdiction of this Court is invoked under Sec. 1254 of Title 28, U.S.C.A. and Rule 37(c) of the Federal Rules of Criminal Procedure.

RULES, STATUTES, CONSTITUTIONAL PROVISIONS INVOLVED AND CONGRESSIONAL LEGISLATIVE HISTORY

Printed in appendix at pages 1a to 18a.

STATEMENT OF THE CASE

This petition for a writ of certiorari is based in the main on two points, the allocution problem and the sentence imposed on Anthony Carminati, after being indicted, tried and convicted under 18-371 U.S.C,

On January 14, 1957, a jury presided over by the Hon. Edw. Weinfeld, U.S. District Judge for the Southern District of New York, returned a verdict of "guilty on count 14" against your petitioner Anthony Carminati, in Criminal case # C-151-226.

The indictment under which Carminati was charged, tried and convicted, accused the petitioner and fourteen other defendants with a conspiracy under Title 18 U.S.C. sec. 371 to violate certain sections of the federal narcotic laws.

In a previous indictment (C-151-78) returned on October 1, 1956, Carminati was charged with conspiring to violate the narcotic laws with the last overt act listed as taking place in March of 1956. In the indictment under which he was tried and convicted, the charges were identical except for the fact that an additional overt act was added claiming that "In furtherance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of August, 1956, in the vicinity of the Delmont Bar, 624 East 180th Street, Bronx, N. Y., Anthony Carminati and Ralph Russano had a conversation."

Both indictments were bottomed by Title 18 U.S.C. sec. 371, and recited that the offense charged was *a conspiracy to violate* the narcotic laws.

At the trial, a narcotics agent testified that he *saw* Carminati talking to Ralph Russano, but did not hear what the conversation was about. His testimony was uncorroborated and was treated as having no value in the prosecution of the case by the trial court and the Government since the prosecutor made note of that witness' testimony thusly:

> "With respect to the request of Mr. Kove that in the event the jury disbelieved Oglesby's testimony as to

> the conversations alleged to have taken place between Oglesby and the defendant Carminati, that then the jury should find the defendant Carminati not guilty, it is the position, your Honor, of the Government, that unless you held that such request was untimely, that as a matter of substance I believe the defendant is entitled to that charge because the only other evidence against Carminati in the case is the meeting with Russano on August 22 * * * so that as to the evidence of the events of August 22, standing alone, I doubt whether your Honor would permit it to go to the jury." (J.A. 16).

Thereupon, the jury was recalled and the court gave the following instruction:

> "I am sorry, ladies and gentlemen, but there is one instruction I overlooked at the time of my main charge that I desire to give you, and that is with respect to the defendant Carminati, as to whom the principal testimony was given by the witness Oglesby, and it makes reference to four different incidents. If at the conclusion of your review of all the evidence you disbelieve Oglesby's testimony, that is, disbelieve in substance his statements made with respect to the defendant Carminati, then I will instruct you to find the defendant Carminati not guilty." (J.A. 16).

Oglesby was the paid informer used by the Government in the case against Carminati and had testified to four different occasions when he claimed he had direct contact or conversations with the petitioner concerning narcotics with the last meeting taking place during the month of February, 1956. **All of his testimony was uncorroborated.**

Salvatore Russano and Ralph Russano, father and son, two other defendants pleaded guilty on December 12, 1956 to the conspiracy count and other substantive counts, but were not sentenced until February 5, 1957 when Frank Rich, Michael Galgano, William McKenney, Jr. and Carminati, who, as co-defendants had been found guilty by the jury on January 14, 1957 presented themselves before the court. Judge Weinfeld imposed various sentences on each defendant seeking guidance from the prosecutor in each and

every case as to whether the convictions came under the new or old provisions of the Narcotic laws as amended by the enactment of the Narcotic Control Act of 1956.

Carminati's sentencing was postponed until February 14, 1957 upon application of his counsel, but petitioner was promptly warned that he had to understand that he was not going to receive any credit towards his time "pending sentence." (J.A. 20-21).

On February 14, 1957 Carminati appeared before Judge Weinfeld for sentence, and without being afforded the right of allocution, as provided for under Rule 32(a) of the F.R. of Cr. P., the court imposed a ten year term of imprisonment thusly:

> "After taking into consideration all the factors which the Court deems pertinent in a matter of this kind, the defendant is sentenced to a term of 10 years." (J.A. 43).

The record or the oral pronouncement did not indicate under what statute the sentence was being imposed, but the Judgment and Commitment order (Form 25) signed by Judge Weinfeld read:

> "IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully, and knowingly conspiring to violate the narcotic laws of the United States. (Title 26, secs. 4704(a), 4701, 4703, 4724(c) and 4771(a), Title 21, secs. 173 and 174, and Title 18, sec. 371, U.S.C.) as charged in count fourteen, and the defendant duly represented by counsel, having admitted he is the same person previously convicted on one separate Federal Narcotic Violation, **and the court having asked the defendant whether he has anything to say why judgment should not be pronounced,** and no sufficient cause to the contrary being shown or appearing to the Court, IT IS ADJUDGED that the defendant is guilty as charged and convicted. IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN YEARS on count fourteen. * * * "
>
> /s/ WEINFELD, J.

The balance of the defendants were treated thusly:

Joseph Ambrosini, Ada Volkell and David Shackleford were tried before Judge Levet and the jury returned verdicts of guilty against all of them with Ambrosini receiving a ten year term, Volkell was sentenced to six years in a Federal prison for women, and Shackleford was sentenced to two years on count 14, the conspiracy count under sec. 7237(a) of Title 26. **(See complete text of this opinion reproduced in J.A. pp. 74 to 79.)**

Mary Lou Brousett Russano, the wife of Ralph Russano was sentenced to a five year term, but on appeal her conviction was reversed on the ground that the conspiracy's continuance had been interrupted sufficiently, as shown by the evidence, to warrant the reversal. Carrenza Howard received a two year sentence and the charges against Donald Bauer, Robert Guippone, Sebastian Della Universita, Carlos Ruiz and *Michael Botto* were nolled.

Botto, a co-defendant in 151-79 and 151-226, pleaded not guilty to both those indictments and his case was severed at the request of the Government before Carminati's trial was ready to be tried.

IN A SUBSEQUENT INDICTMENT — 151-284, FILED IN DECEMBER OF 1956, BOTTO WAS CHARGED WITH CONSPIRING TO VIOLATE THE NARCOTIC LAWS UNDER *18 U.S.C. sec. 371*, AND ON HIS PLEA OF GUILTY, RECEIVED A TWO-YEAR UNSUPERVISED SUSPENDED SENTENCE.*

---

* At both Carminati's and Ambrosini's trial, Botto appeared as a Government witness and admitted that he trafficked in narcotics but had given up the business in June of 1956 and became a paid informer for the Bureau of Narcotics. (P. 132 transcript.). In his opening statement to the jury in Ambrosini's trial, John Lankenau, the prosecutor who participated in the conviction of Carminati, said: "* * * The Government will prove that Botto joined the conspiracy in 1955 and began to buy heroin from Ralph and Salvatore Russano—he had partners, Frank Rich and David Shackelford and latter William McKenney, Jr. * * *".

On direct examination Botto stated that the agents had paid him from October 1955 through February 1956 to "make" cases, but thought he received some money in December of 1956. (Tr. p. 104.)

Petitioner appealed the conviction but former counsel made no attack on the sentence or the procedure attendant thereto. The Court of Appeals affirmed the judgment of the District Court on August 23, 1957 (247 F.2nd 640) and this Court denied certiorari on November 7, 1957, 355 U.S. 883, 78 S. Ct. 150 (1957).

On February 14, 1957 he was removed to the Federal Detention House at West Street in New York City to await transfer to Leavenworth Penitentiary. On February 20, 1957 a new attorney, Menahim Stim in association with Jacob Friedman filed the notice of appeal with the District Court and a copy of that notice was delivered to the warden of the Detention House on the 21st.

On February 28, 1957, Carminati was coerced into signing a waiver under Rule 38(a) of the Federal Rules of Cr. Procedure by employees of the Detention House and spent THREE HUNDRED AND NINE (309) DAYS thereafter at West Street WITHOUT receiving any credit towards the ten year sentence imposed.*

In the latter part of 1959 and the early part of 1960, present counsel filed two motions [illegible] the first one seeking relief for Carminati by having him properly resentenced because of the trial court's failure to grant him the right of allocution under Rule 32(a) and the second one was based on his right to a reduction or correction of sentence under Rule 35 of the F.R. of Cr. P. contending that the sentence of ten years, as imposed, was excessive, beyond the maximum authorized by statute, illegal

---

* This information was supplied to Judge Weinfeld on January 11, 1960 at the time of the oral argument had in connection with the plea for relief under the allocution motion, and renewed formally in December of 1960 in a motion under 2255 argued before the Hon. Palmieri, E., U.S.D.J.S.D.N.Y., and *denied*, not reported here because the time for appeal from that decision has not expired, but petitioner asks this Honorable Court to take judicial notice of the proceedings which will indicate that all of the employees of West Street and the warden joined in denying that any pressure was used to secure Carminati's signature to the waiver.

and because the defendant had been sentenced as a second offender under a statute for which violation he had neither been indicted nor tried nor convicted.

Both motions were denied. The first on February 18, 1960 and the second on April 4, 1960.

At the oral hearings on the allocution motion held January 11, 1960, Judge Weinfeld admitted that the failure to ask the defendant if he wanted to say anything before he was sentenced, was the first error of its kind in *his* court because, " * * * I am surprised that this happened, very frankly. I am usually extraordinarily careful and say, "is there anything you wish to add to the statement of counsel?" * * * "In any event, it is clear, the record is clear that the defendant himself was not asked if there was any statement that he desired to make or as to why sentence should not be imposed." (J.A. 46-59).

When the written memorandum was issued by Judge Weinfeld denying the first motion, Carminati, for the first time, learned that "The Court imposed the *minimum* sentence under the mandatory provisions of the Narcotic Control Act and in the face of the application was granted of necessity the same sentence would be compelled. To grant this application upon the facts here presented would be slavish adherence to form; it would exalt form over substance. Motion denied."

In denying petitioner's second motion for a reduction and or correction of sentence, the court made short shrift of Carminati's plea in a two-word opinion—"Motion denied." Cf. *U. S.* v. *McKenney and Galgano*, (181 F. Supp. 183) (Full opinion reported on pp. 83 thru 87 of the J.A. herein.)

Now, on April 4, 1960, having been referred to the McKenney opinion to see why his motion was denied, for the first time in more than three years after sentence was imposed on him, Carminati learned that he was sentenced under the 'built-in' conspiracy clause of Title 21 sec. 174 U.S.C., as amended, under the Narcotic Control Act of 1956, to the minimum term prescribed for second offenders under the newly amended act effective July 19, 1956, although the

trial court had been most precise in instructing the jury that from the evidence presented they would have to find him not guilty if Oglesby's testimony was disbelieved.

The appeal based on the denial of the two motions was heard on June 13, 1960 and on August 22, 1960 the Court of Appeals affirmed the denials and refused to grant a petition for rehearing on September 27, 1960. (281 F. 2d 908.)

This Court granted an extension until February 1, 1961 within which to file the petition for a writ of certiorari and further extended the time until February 15, 1961.

Your petitioner was confined at West Street Federal Detention House for 309 days from February 14, 1957, for which he received no credit, until he was transferred to the United States Federal Penitentiary at Leavenworth, Kansas, where he is now confined and serving the sentence pronounced by the court. He has been informed that he is classed as a second offender under the Narcotic Control Act of 1956 and is not entitled to seek parole under Title 18 sec. 4202 U.S.C. although a computation of his time from February 14, 1957 will reveal that if he had been correctly sentenced under the proper statute, he would now be eligible for release counting the good time allowance and the additional industrial good time earned.

As the record stands now, he is serving a sentence of ten years and 309 days.

QUESTIONS PRESENTED

1. Whether a court, acting pursuant to the Federal Rules of Criminal Procedure, may upon a showing of a failure to grant the defendant the right of allocution *as required under Rule 32(a) F.R.Cr.P.*, deny unto that defendant the right to be resentenced?

2. Whether a judgment entered against the defendant was invalid where the court admitted error that it had violated Rule 32(a) of the F. R. of Cr. P. by not offering the petitioner an opportunity to speak before sentence was imposed?

3. Whether a "conviction upon a single count indictment charging a conspiracy in violation of 18 U.S.C. 371 to receive, possess, and sell heroin in violation of the federal narcotic laws, 21 U.S.C. secs. 173, 174; 26 U.S.C. secs. 4701, 4703, 4704(a), 4724(c) 4771(a)," and the sentence imposed thereon can stand, when the *single* count of the indictment charged against defendant can be construed to be conduct which is punishable under three (3) separate sections, each of which entails a different punishment?

4. Whether the court erred when it instructed the jury how and when to find the defendant guilty under the "old" statute but prejudiced the defendant by sentencing him under the "new" statute which provided for more severe and harsher penalties?

5. Whether a verdict of "guilty on count 14" (with that count described by the court thusly: "Under the 14th count (Carminati) is charged with conspiracy *to violate* certain federal laws enacted in an effort to curb the sale and distribution of narcotics for illegal purposes" and further described " " " a *conspiracy to commit* a crime is made by statute, an entirely distinct offense, separate from the substantive crime itself)"—can be interpreted by the court when imposing sentence, as a conspiracy in violation of Title 21 sec. 174 U.S.C.; as amended by the Narcotics Control Act of 1956, where the evidence and instructions are given under and applicable to 18-371?

6. Whether the procedure provided for determining the identification and charging of the defendant with being a second offender, in order to be subjected to the harsher penalties provided for by the narcotic laws as amended by the Narcotic Control Act, is Constitutional, or void, because of being vague, indefinite and written in a manner contrary to the rights of the accused as provided for by the Fifth and Sixth Amendments and the applicable rules of the F.R. of Cr. P.?

SPECIFICATIONS OF ERRORS TO BE URGED

1. The Trial Court erred in failing to afford the defendant the right of allocution as required under Rule 32 (a) of the Federal Rules of Criminal Procedure.

2. The Trial Court erred when it imposed an excessive and illegal sentence under Title 21 U.S.C.-sec. 174 as amended by the Narcotic Control Act of 1956 rather than imposing sentence as authorized and required under Title 18-371 U.S.C.

3. The courts below erred in holding that the Petitioner was indicted and tried for violating Title 21-sec. 174 U.S.C. as amended by the Narcotic Control Act of 1956, when in fact he was indicted, tried and convicted under Title 18-sec. 371 of the U.S.C. with the Court of Appeals affirming that conviction and making same *res judicata*.

4. The trial court invaded the province of the jury by deciding that a guilty verdict upon an indictment charging a defendant with a conspiracy to violate five sections of Title 26 and two sections of Title 21, and tried after *first* noting that the charge against the defendant was under Title 18-371 of the U.S. Code that the sentence then had to be imposed under Title 21-174 as amended by the Narcotic Control Act of 1956.

5. The courts below erred in holding that the defendant was a second offender under the Federal Narcotic laws although the crime he was indicted, tried and convicted for was conspiring to violate Title 18-sec. 371, the General Conspiracy Statute, a separate and distinct offense.

6. The Statute or Act (N.C.A. of 1956) providing punishment for violating narcotic laws is unconstitutional because of being vague, indefinite and violates the V and VI Amendments to the Constitution.

REASONS FOR GRANTING THE WRIT

The Courts below have rendered and approved decisions that are in conflict with other district and Circuit Courts as well as creating conflict within its own district.

The Courts below have decided important questions of law contrary to earlier and *later* decisions of the district and Court of Appeals in the Second Circuit and both lower courts have decided important questions of Federal law in conflict with applicable decisions of the Supreme Court.

The Court below has sanctioned and approved the procedure of the district court which has applied sentencing procedures incorrectly and in violation of defendant's constitutional rights to such an extent as to call for the exercise of this Court's power of supervision.

The decision of the District Court and the Court of Appeals affirmance is in conflict with Rules 32 (a), 35, and 52 (b) of the Federal Rules of Criminal Procedure and incorrectly decides questions of general importance and substance relating to the construction and application of the Federal Constitution in a manner contrary to the applicable decisions and mandates of the Supreme Court.

ARGUMENT

I. Petitioner's Sentence Is Invalid for Failure of Trial Court to Comply With Rule 32(a), F. R. Cr. P.

Rule 32(a) requires that before imposing sentence, the trial judge shall afford the defendant an opportunity to make a statement "in his own behalf", and to present any information in mitigation of punishment.

This right to speak, known as the *allocutus*, has been handed down from the early common law and Rule 32(a) is designed to continue that ancient right in the federal courts.

A statement by counsel for defendant is no substitute for defendant's statement "in his own behalf". This is expressly recognized by the language use in Form 25 the Judgment and Commitment form in the Appendix to the Federal Rules of Criminal Procedure, wherein the Judgment recites:

> "* * * and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, * * *".

This specific language confirms the duty of the trial judge to make an affirmative inquiry *of the defendant himself*.

In the instant case, the record is clear and shows on its face that this important right was not afforded Carminati, and that the judge failed to ask him whether he had anything to say before sentence was imposed. (J.A. 38 to 43, 44 to 59, and 60 to 64).

Since those facts are undisputed and admitted both by the courts below and by the prosecution, it remains but to determine the effect of the failure to extend the right of allocution on the sentence imposed.

At the end of the 17th Century, the courts had already recognized the rule that a failure to ask the accused whether he had anything to say before sentence was imposed required reversal. See *Anonymous*, 3 Mod. 265, 87 Eng. Rep. 175 (K.B. 1689); *Rex* v. *Geary*, 91 Eng. Rep. 532 (K.B. 1689); *1 Chitty: Criminal Law 700* (1816); *4 Blackstone, Commentaries 375* (Lewis ed. 1897).

In *Ball* v. *United States*, 140 U.S. 118, 11 S. Ct. 761, at 767, the Supreme Court stated that the great weight of authority in the United States was that "a sentence must be set aside if the defendant has not been asked if there was any reason why sentence should not be pronounced". See also, *Schwab* v. *Berggren*, 143 U.S. 442. "This right has been jealously guarded from very ancient times", *People* v. *Nesce*, 201 N.Y. 111, 94 NE 655.

But the circuits are in conflict as to whether Rule 32(a) makes it mandatory for the trial judge to ask the defendant if he has anything to say before being sentenced, and have reached varying conclusions.

In *Couch* v. *U. S.*, 235 F. 2d 519 (D.C. Cir. 1956), the Court of Appeals, sitting *en banc* has ruled squarely that the Rule imposes upon the sentencing court the affirmative duty to ask the accused whether he desires to make a statement. All eight judges who participated in that decision agreed that the question could be raised in a proceeding under Title 28, Section 2255 U.S.C., but four judges decided that the rule would be applied as to future cases only, and not retroactively, while the other four judges expressly decided that it would even apply retroactively. Since there was no majority on this point, the Rule is applied in all cases after *Couch*, in the District of Columbia.

The *Couch* case was heard and decided by the full court because in two earlier decisions by different divisions of the court, different conclusions had been reached on the same question: See *Gadsen* v. *U. S.*, 223 F. 2d 627 (C.A.D.C. 1955); held that the sentencing court had an affirmative duty to ask the accused whether he desired to make a statement; *Hudson* v. *U. S.*, 229 F. 2d 36 (C.A.D.C. 1956), held that the rule was complied with when both counsel and defendant were present and counsel made a statement. The *Hudson* decision can now be discarded since the *Couch* Rule, agreeing with the holding in *Gadsen*, is now controlling.

As the dissenting opinion of two of the eight judges points out, the *Couch* decision constitutes a REVERSAL of the *Hudson* case.

In *Taylor* v. *U. S.* (No. 16726 C.A. 9), (not yet reported, decided December 12, 1960), the Ninth Circuit, found it necessary to hear the case *en banc;* the majority held that the defendant's right under Rule 32(a) may be waived by counsel, but four judges of that circuit felt that the right is personal and cannot be waived by counsel.

In *Calvaresi* v. *U. S.*, 216 F. 2d 891, at 901, the Tenth Circuit considered this question *inter alia*, and held that, in the absence of a request to speak, by the defendant in person, or a request through counsel for defendant to speak, the court cannot say that defendant was not afforded an opportunity to be heard before sentence was imposed. Cert. granted, 75 S. Ct. 522, and reversed.

In *Sandroff* v. *U. S.*, 174 F. 2d 1014 (C.A. 6-1949), the Sixth Circuit said:

> "While it would have been in appropriate conformity with the above rule had the district judge asked appellant Sandroff whether he desired to make a statement, it would appear from his inaction that Sandroff did not wish to do so. Though the judge posed the query, 'Anything further'?, neither appellant nor his attorney spoke up to the effect that Sandroff wished to be heard or to present information in mitigation of punishment. We cannot say that appellant was not afforded an opportunity to make a statement. There is nothing to indicate that he was shut off."

The First Circuit, in *Green* v. *U. S.* (C.A. 1-1959), 273 F. 2d 216, held that personal solicitation of a defendant to speak was not essential when he is represented by competent and experienced counsel of his own choice who has had an opportunity to speak and present information bearing on the matter.

In the *Green* case, the Court of Appeals referred a previous action of the defendant's (256 F. 2d 483) touching on the fact that he was ably represented by an experienced lawyer of his own choice, but that contention was insufficient for on April 18, 1960, the Supreme Court of the United States in Memorandum Opinion #596, misc. 80 S. Ct. 867, ordered

> "Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted limited to Question 3 * * * which reads:

> "Whether the judgment was invalidated where the court did not offer the petitioner an opportunity to speak before the sentence was pronounced. Case transferred to appellate docket and placed on Summary Calendar."

(It is the understanding of present petitioner that this case has been presented and argued during January, 1961, but as of the date this petition was printed, he was not aware of any opinion being rendered.)

In *Mixon* v. *U. S.* (C.A. 5-1954), 214 F. 2d 364, the Fifth Circuit held that defendant had waived his right to complain when he did not appeal from the sentence. But even there, Judge Rives, specially concurring, said that if this complaint were made on a direct appeal, affirmance would not be justified, since Rule 32 is mandatory. He points out that a defendant does not have to ask for or *demand* the right to speak, it must be "afforded" to him. "The rule contemplates no such demand, and clearly, without the necessity of any demand at that stage of the trial, the defendant's legal rights should be accorded to him by the court".

Petitioner Carminati states that it is no answer for the government to say that the rule was complied with "in spirit", or that such an inquiry would appear to be an idle gesture, or that defendant has shown no prejudice, or that a compliance with the rule would be, as Judge Weinfeld stated in the instant case, "slavish adherence to form; it would exalt form over substance".

Short shrift is made of all these arguments by the concurring opinion in *Couch* v. *U. S.*, 235 F. 2d 519, of Judges Fahy, Edgerton, Bazelon and Washington, who held, at page 521:

> "We wish also to make plain our own view that where the procedure now prescribed is not followed, error occurs THAT REQUIRES RESENTENCING in accordance with Rule 32(a), * * *.

"Rule 32(a) * * * has the force of law. See 47 Stat. 904 (1933), as amended, 18 U.S.C. Sec. 3772; Order of Feb. 8, 1946, Adopting Rules 32-39, 18 U.S.C.A. xix (1951); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 61 S. Ct. 422, 85 L. ed. 479; * * * (citations) * * *.

"We think the Rule means, as it says, that before imposing sentence the court shall afford defendant an opportunity to make a statement in his own behalf and to present information in mitigation of punishment. He may respond through counsel or he may remain silent. But the opportunity afforded must be PERSONAL, and *it is not when, as here, the judge asks only counsel if counsel has anything to say.* This court recognizes that the latter procedure should be changed. We think that where the procedure prescribed by the Rule is not followed, the error is NOT to be ignored as harmless."

After tracing the evolution and history of the right of allocution from ancient times up to the present, these four Judges clearly stated, at pages 523, 524:

"The retention of the practice no doubt was motivated by the desire of the law to preserve those salutary procedures in the administration of justice sanctioned by experience and sound policy . . .

"Rule 32(a) now extends the ancient procedure to *all* criminal cases in the federal courts. FEDERAL CASES WHICH ANTEDATE THE RULE, AND STATE CASES NOT GOVERNED BY IT, WHICH HELD THAT ALLOCUTION WAS NOT INDISPENSABLE, ARE THEREFORE OF NO RELEVANCY. For we think the Rule has now become a Command upon the federal courts. *To permit a departure from this command to go uncorrected in a particular case * * * in purview would be to permit a practice which violates the Rule to supersede a rule of law prescribed by the Supreme Court under authority of Congress after centuries of development in the common law.*"

Present counsel cannot improve upon the language of Judge Fahy and his associates, *supra*, in the *Couch* case. Enough has been said to show that there is a divergence, a difference of opinion between circuits, between judges in the same circuit, and all over the United States.

The right of allocution, under Rule 32(a) is involved in every criminal case where there is a conviction, in every district court of every circuit in the United States and its Territories. The Supreme Court, in the exercise of its supervisory powers, is called upon in your petitioner's pleading to interpret its own Rule so that it may be uniformly observed in every lower federal court.

We urge, therefore, that the failure to comply with Rule 32(a) invalidates the sentence and that petitioner be ordered resentenced, *nunc pro tunc*, as of February 14, 1957, the date of original sentence, and receive credit for all the time served since that date, for purposes of sentence, parole and good-time credits.

II. The Defendant Was Prejudiced and His Conviction Should Be Reversed, Set Aside or Amended Because He Was Indicted, Tried, Found Guilty, Convicted and Adjudged as Having Committed the Crime of Conspiring to Violate the Narcotic Laws, Title 18, Sec. 371, U.S.C., But Was Sentenced as a Second Offender Under the Special "Built-In" Conspiracy Statute of Title 21—Sec. 174 as Amended By the Narcotic Control Act of 1956

Only two witnesses connected Carminati with the conspiracy in any manner whatsoever; Oglesby, the paid informer who testified to four overt acts, the last one being in February of 1956, and Dugan, the Government agent, who *saw*, but did not hear, Carminati talk to a co-defendant on August 22, 1956.

Dugan's testimony was worthless and was recognized as such by both the trial judge and the prosecutor.

The trial judge instructed the jury to acquit Carminati if they did not believe Oglesby (J.A. 16) and the prosecutor conceded that Dugan's testimony standing alone was insufficient to go to the jury (J.A. 16).

In the opinion rendered in the instant case, the court below declared "Count 14 charges a conspiracy to violate 21 U.S.C.A. Sec. 173, 174. Such a conspiracy, if proven, constitutes in itself a violation of 21 U.S.C.A. Sec. 174."

If this statement is made as settled law, it is a precedent-making statement, and made without any decision or authority.

Your petitioner challenges the legality or correctness of it by referring this Honorable Court to the opinions of the Supreme Court and the various courts of appeal in the different circuits which have held that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. See *U. S.* v. *Rabinowich*, 238 U.S. 78, 35 S. Ct. 682; *U. S.* v. *Hirsch*, 100 U.S. 33, 25 L. ed. 539; *Braverman* v. *U. S.*, 317 U.S. 49, 63 S. Ct. 99; and the substantive offense is not merged in the charge of conspiracy, *Ellerbrake* v. *U. S.*, 7 Cir. 134 F. 2d 683, 685, and if the offenses are distinct in law, they are not identical. *Montrose Lumber Co.* v. *U. S.*, 10th Cir., 124 F. 2d 573, 575; *Robinson* v. *U. S.*, 10th Cir., 143 F. 2d 276; *Catrino* v. *U. S.*, 9th Cir., 176 F. 2d 884. See also *Gavieres* v. *U. S.*, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. ed. 489, and *Blockburger* v. *U. S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. ed. 306, and in *Pinkerton* v. *U. S.*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. ed. 1489, at page 643 of 328 U.S. and at page 1182 of 66 S. Ct., 90 L. ed. 1489, the Supreme Court said:

> "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established."

In spite of the authorities cited, the court below insists that "* * * such a conspiracy, if proven, constitutes in itself a violation of 21-sec. 174 * * *."

Such a decision is contrary to what the lower court said in answer to petitioner's first appeal based on different grounds. In *Carminati et al.* v. *U.S.*, 2 Cir. 247 F. 2d 640, the opinion read:

> "Appellant(s) was convicted upon an indictment charging him with *a conspiracy in violation of 18 U.S.C. 371* to receive, possess, and sell heroin in violation of the federal narcotic laws. 21 U.S.C. 173, 174. 26 U.S.C. secs. 4701, 4703, 4704(a), 4724(a), 4771(a)."

Evidently res judicata is treated lightly and not given the accepted weight and respect it commands, at least not by the Second Circuit when one has but to read the first and second opinions rendered in petitioner's cases and conclude that they are classic examples of dissertations in oppositeness.

Petitioner relies on the decision in *Patterson* v. *U.S.*, 2 Wheat., 221, 4 L. ed. 224, where this Court ruled that:

> "* * * It has been settled time out of mind to charge but one crime in one count, to accept but one general plea to it and to call upon the jury to make but one general response, 'guilty or not guilty.' Such procedure was obviously departed from here over appellant's objections and it may not be held that such a departure did not affect appellant's substantial right to be tried according to law. It is not the functions of the courts subordinate to the Supreme Court to introduce innovations of criminal procedure. * * *"

In *Gray* v. *U.S.*, 174 F. 2d 919, the court there said that it was error for the trial court to put the defendant in jeopardy on charges not made in the indictment and discharging the jury which did not render a verdict of guilty on the charge the court stated the defendant was sentenced under,—"and for that reason he is entitled to have the judgment against him avoided."

In *Gray* v. *U.S.*, *supra*, citing the *Patterson* v. *U.S.* case, *supra*, it was said . . . "It is beyond argument that a man cannot, under the Fifth and Sixth Amendments, be convicted and sentenced for an offense not charged and proven against him, and that is the situation in which the appellant stands upon the record before you. * * * A verdict is bad if it varies from the issue in a substantial matter."

In *Gaddis* v. *U.S.*, 280 F. 2d 334, 336, the rule of court was:

> "There is an inconsistency, however, in the pronouncement of sentence and the judgment of conviction. * * * When there is any ambiguity, the prisoner is entitled to have the language in the pronouncement construed most favorable to him."

But as far as your petitioner's case is concerned, what are the answers to these questions?

What was Anthony Carminati indicted for?

What was he charged with according to the charge and instruction given by the Court?

What was he convicted of?

What did that conviction call for as far as punishment was concerned?

Aside from the length of the sentence imposed, was Anthony Carminati sentenced under the right statute, based on the indictment, charge, instructions to the jury, the verdict and conviction?

With those questions propounded, can the statute be declared clear, unambiguous, not vague when Judge Levet in sentencing David Shackleford, another co-defendant of Carminati's, ruled:

> "* * * by the inclusion of the phrase 'or conspires' to in the listed substantive offenses of secs. 173 and 174 of Title 21 and the applicable sections under Title 26, I.R.C.—that separate substantive offenses have been created * * *" (J.A. 78) and then concludes that Shackleford should be sentenced under 26—sec. 7237(a) because it is the more lenient section of the Act.

Judge Levet reasons in the Shackleford matter, that the Government's reliance on *Williams* v. *U. S.*, 238 F. 2d 215, cert. den. 352 U.S. 1024, where the defendant failed to move pursuant to Rule 31(c) F.R.Cr.P. for a verdict indicating the degree of the crime, is error, and that because he had waived the defect in the form of the indictment was at the mercy of the prosecution. Judge Levet ruled "it is now a distinct offense to conspire to violate either the Jones-Miller Act or the Harrison Act, and the latter is not necessarily includible in the former." (J.A. 78)

Then the trial judge, the Hon. Weinfeld, E. D.J. in denying Carminati's prayer for relief under Rule 35 of the F.R. of Cr. P. and or Title 28, sec. 2255 U.S.C., refers the petitioner to his opinion issued September 2, 1959 in the matter of Galgano and McKenney, Jr., other defendants in the same indictment which reads:

> "Petitioners McKenney and Galgano, together with others, were convicted upon a trial by jury of conspiracy to violate certain provisions of the narcotics laws including section 174 of Title 21. × × ×
>
> Count 14 of the indictment, the only one which concerns us here, charges in four paragraphs that petitioners and others conspired to violate seven specific provisions of law, namely, 26 U.S.C., sections 4704(a), 4701, 4703, 4724(c), 4771(a), 21 U.S.C., sections 173 and 174. Next appears a list of overt acts allegedly done in furtherance of the conspiracy. At the end of the list there is the following citation: "(Title 18, United States Code, Section 371)". × × ×
>
> Petitioners proceed on the assumption that Congress by the inclusion of the words 'or conspires' under the 1951 amendments to Section 174 of Title 21 and section 7237(a) of Title 26, created a new, separate and distinct crime of conspiracy. The amendments to those sections simply related ot the matter of punishment and did not create a new crime. The crime of conspiracy is defined only in section 371 of Title 18. No definition appears in other sections. Thus it was proper to refer to the general conspiracy statute in the indictment. The evidence adduced upon the trial not only 'conclusively proved' a conspiracy to violate the narcotics laws but it left no doubt that the hard core of the conspiracy was to violate section 174 of Title 21. The verdict of the jury must be read 'guilty as charged in the indictment'; it cannot be interpreted as anything less. It follows that petitioners were validly sentenced under section 174 of Title 21." (See full opinion JA 83 through 86).

Yet, when Judge Weinfeld instructed the jury in your petitioner's case, he was careful to point out:

"Under the 14th count these four defendants, as well as others, are *charged with conspiracy to violate certain federal laws enacted in an effort to curb the sale and distribution of narcotics* for illegal purposes.

Generally speaking, *a substantive count* charges *a basic violation of the law*, for example, in this case, under the 3rd and 4th counts, the illegal sale of narcotics and under the 8th count facilitating the transportation of narcotics.

The conspiracy count against the four defendants and the three substantive counts against Rich *are in some respects governed by different laws.*

It is almost always characterized by secrecy, rendering detection difficult and requiring much time for its discovery. Because of this, *a conspiracy to commit a crime is made by statute an entirely distinct offense, separate from the substantive crime itself. I shall later discuss the conspiracy and the substantive counts in detail.*

The 14th count of the indictment charges a conspiracy to violate specific provisions of the Internal Revenue Code which were enacted by the Congress in an effort to curb the illegal traffic in narcotics.

Thus Sections 4701, 4703, 4704(a), 4724(c) and 4771(a) of Title 26 of the United States Code, *sometimes referred to as the Harrison Act, make it an offense to sell or distribute narcotics except from an original container to which are affixed revenue stamps;* and also make it illegal for one *to sell or distribute narcotic drugs without registering* with the Secretary of the Treasury for that purpose.

Then there are Sections 173 and *174 of Title 21* of the United States Code, *known as the Jones-Miller Act*, which make *it a crime to import a narcotic drug* into the United States *contrary to law*, or *to receive, conceal, buy, sell*, or in *any manner* facilitate the transportation, *concealment or sale of any such drug after importation—knowing the same to have been imported contrary to law.*

These are the laws which the Government charges the defendants conspired to violate.

This indictment is bottomed upon Section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy.

Putting it another way—the defendants are not charged with violations of the Harrison Act or the Jones-Miller Act—those would be substantive violations. They are charged under the 14th count with a conspiracy to violate those laws."

Petitioner does not quarrel with that logic or pronouncement of law. He makes no complaint that the facts as pleaded may have referred to another statute. In his case, there is no question that the indictment charged him with a conspiracy under Title 18-371 *to violate* the 5 sections of title 26 and the two sections of title 21, but he is also sincere in his plea for justice in insisting that he was not charged with a conspiracy *in violation of* the 5 sections of title 26 or accused of conspiring *in violation of* title 21 secs. 173 and 174. There is a world of difference in the two ways that the indictment could have been drawn.

In the lower court's opinion against *Carminati*, 281 F. 2d 908, J. Waterman speaking for the court decided that "Count 14 charges a conspiracy to violate 21 U.S.C.A. 173, 174. Such a conspiracy, if proven, constitutes in itself a violation of 21 U.S.C. sec. 174."

But in *In re Snow*, 7 S. Ct. 556, this Court ruled . . .

> "It is to prevent such application of penal laws that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purposes of the indictment or prosecution, prior to the time the prosecution is instituted.
>
> * * * There was but a single offense committed prior to the time the indictment was found. This appears on the face of the judgment."

Finally, we have the opinion of Judge Palmieri who discussed in *Ogull* v. *U. S.*, 149 F. Supp. 272, *supra*, what he believed ought to be the procedure in securing justice

for a defendant when a case of the type now being considered confronts the trial court at the time sentence is to be imposed."

"• • • • In a prosecution for conspiring to unlawfully traffic in narcotics, between dates in 1956 where the applicable statute was amended so as to increase penalties applicable to a conviction on a conspiracy count, and a sharp issue of fact was raised whether a defendant abandoned his criminal membership before effective date of the amendment, and a determination of the issue could not be gleaned from a general jury verdict, court would seek clarification from the jury with respect to the issue by asking the jury to answer special questions after it had decided on a general verdict. • • • since (this) prior membership in the conspiracy is sufficient to support such a verdict. I therefore feel impelled to seek reliable factual guidance for the eventual imposition of sentence. Either the jury by special findings, or I, will have to determine whether or not he continued his membership beyond the effective date of the 1956 amendment. But for me to determine this issue would probably amount to a denial of the defendant's constitutional rights to be tried by jury and to due process of law (citing cases, see note 5 of case, page 275 of 149 F. Supp.). Indeed, it may even be urged that it would be unconstitutional to do so with respect to the defendant who introduced no evidence as to his having disassociated himself from the conspiracy. • • • Thus, departures from the unqualified general verdict are certainly not breaks with tradition. What is sacrosanct, it would seem, is the right of a defendant to have the jury deliberate and apply the law free from judicial trammel. (Citing cases in note 8 and 11 of the case.) Hence, no one has ever questioned the propriety of placing upon the jury the obligation to qualify a verdict of guilty by choosing between life and death sentence, as is done under 18 U.S.C., sec. 1111(b) (murder); 1201 (kidnaping); and 1992 (train wrecking resulting in death) (citing Andres v. U.S., 68 S. Ct. 880, and U.S. v. Poff, 211 F. 2d 171. • • • It has been made clear that the answers to the questions are not bases for the jury's deliberations, nor can they be tests of the propriety of the verdict. Hence, it is hard to understand how the general verdict might be vitiated. • • • I should state in conclusion that I am faced with a situation in which it is my duty to consider sentences under the provisions of a new statute. However, I cannot constitutionally make the factual determination that is a condition precedent to its application. The appropriate arm of the court for this purpose is the jury, and history and common sense authorize it to perform this function. • • •"

The jury answered most of the questions and the sum and substance was that the defendants were guilty of a conspiracy that extended beyond July 19, 1956.

In *Buzzell* v. *U. S.*, 187 F. 2d 878, cert. denied 72 S. Ct. 73, the court cited *Williams* v. *U. S.*, 168 U.S. 382, 389, 18 S. Ct. 92, 94, 42 L. ed. 509, ruling that, "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. * * *. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute." *U. S.* v. *Hutcheson*, 312 U.S. 219, 229, 61 S. Ct. 463, and *Taylor* v. *U. S.*, 7 Cir. 2 F. 2d 44 were further cited for support, and

"* * * A combination of two or more persons by concerted action to accomplish a purpose either criminal or otherwise unlawful comes within the accepted definition of conspiracy. *U. S.* v. *Hutto*, 256 U.S. 524, 528, 41 S. Ct. 541. It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. *American Tobacco Co.* v. *U. S.*, 328 U.S. 781. * * * The crime is frequently established as a result of the inferences drawn from the acts of the persons accused. *U. S.* v. *Holt*, 7 Cir., 108 F. 2d 365, 368, and *U. S.* v. *Glasser*, 7 Cir. 116 F. 2d 690. * * *."

"*Putting it another way—the* petitioner was *not charged with violations of the Harrison Act or the Jones-Miller Act—those would be substantive violations.* He was *charged under the 14th count with a conspiracy to violate those laws.*" (J.A. 11) and a demand being made to be a witness against himself, and asking him to admit to a previous conviction which if admitted, is to be used as the basis of an enhanced and more severe punishment under the amended specific sections of the narcotic laws (Secs. 7237 of Title 26 and secs. 173 and 174 of Title 21, U.S.C.A., is the equivalent of a violation within the meaning of the fourth amendment.

In the *Bazzell* case, 187 F. 2d 878, *supra*, the defendants contended that the rule of law laid down in *Enfield* v. *U. S.*, 8 Cir., 261 F. 141, was controlling because "where there was special legislation which carried with it a section dealing with conspiracy to commit the crime described in such legislation, that *any* conspiracy action *must* be brought under such section of the statute and not under the General Conspiracy Statute (18-371).

In other words, applying that theory to *Carminati's* case, insofar as prosecution under the Narcotic Control Act of 1956 *or* the Boggs Act, as the Jones-Miller and Harrison Narcotic Acts were known prior to July 19, 1956, Title 18-371 of the Criminal Code was repealed by implication. And, as the defendants made the point in the *Bazzell* case, *supra*, and the prosecution and the courts below likewise made in *Carminati's* case, that because the narcotic acts in effect prior to July 19, 1956 and the Narcotic Control Act effective after July 19, 1956 contained a "built in" conspiracy provision, a conspiracy to commit the crime described in those applicable sections had to be brought under those specific sections and not under sec. 371 of Title 18.

In *Davis* v. *U.S.*, 279 F. 2d 577, the court there states:

> "* * * when Congress enlarged the penalties and prescribed minimum prison terms for narcotic offenses, it issued a command that bound the district courts to impose sentences under sec. 7237 of Title 26 rather than under Title 18 sec. 371 of the U.S. Code, and that if the resulting sentence was so imposed, it was not illegal."

This opinion is contrary to the law as settled in *Bazzell* v. *U.S.*, 187 F. 2d 878, *supra*.

The panel sitting in the *Bazzell* case held that such thinking did not support such a contention for the reason that "that case did not involve an implied repeal of the general conspiracy statute." It related to an express repeal. It further held that Section 371 declares illegal an agreement to commit *any* offense against the United States, and provides, if a felony, that the violator thereof shall be fined no more than ten thousand dollars or imprisoned not more than five years, or both, and that the special statute (and in Carminati's case, secs. 173, 174 of Title 21 and the statutes under 7237 of Title 26, U.S.C.) contained no language tending in the slightest degree to indicate that prosecution under sec. 371 should be excluded, and therefore concluded that the "special" statutes did not impliedly repeal sec. 371 of Title 18—they merely provided an increased penalty where the offense—the object of the conspiracy—was the crime of committing the substantive acts in violation of the applicable statutes.

Masi v. *U.S.*, 223 F. 2d 132, is referred to and relied upon by the courts below for their authority in ruling that as between two statutes, the particular is entitled to preference over the general.

There is but one difference and that the courts below have overlooked in petitioner's case,—that a line of distinction must be drawn as between those types of statutes where a defendant is charged with a conspiracy *to violate* under Title 18—sec. 371, U.S.C. and an indictment that charges a defendant with a conspiracy in violation of Title 21, secs. 173, 174, that is to say, for example, as was declared in *Padilla* v. *U.S.*, 278 F. 2d 188 (5th Cir.):

> "'* * * the defendant herein, unlawfully, wilfully, and knowingly did conspire and agree with * * * a co-conspirator, * * * to fraudulently and knowingly import and bring into the United States a quantity of narcotic drugs, to wit: (cocaine) (heroin), contrary to law, to wit, section 173 of Title 21 U.S. Code; in violation of section 174 of Title 21, U.S.C."

If the indictment in the instant case had been drawn as above, there is no doubt that Carminati would have been fully forewarned as to what he was being charged with, and the present problem would have no place in this Court. (See also *Continental Baking Co. et al.* v. *U.S.*, 281 F. 2d (1960) 137, for proper way of charging a conspiracy *in violation* of the "built-in" conspiracy statute). See *Holt* v. *Comm. of Kentucky*, 284 F. 2d 395 (1960) "• • • The accused was entitled to a jury trial of the charges in the indictment and before a plea of guilty was accepted he should have been fully informed of his rights, the nature of the charge and the penalty to which he would be subjected." [Compare procedure of handing up information after verdict so that defendant could be subjected to second offender sentence.]

In *U. S.* v. *Goldman* (2 Circuit 1941), 118 F. 2d 420, Circuit Judge Chase writing for the Court states in the opening paragraph of the opinion:

"The appellants were indicted in the Southern District of New York for conspiring contrary to the provisions of 18 U.S.C.A. sec. 88 (now Title 18-371) to commit an offense against the United States by (receiving or attempting to obtain money for acting or forbearing to act in a bankruptcy proceeding) in violation of 11 U.S.C.A. sec. 52 sub b."

That is the correct way of interpreting an indictment under 18-371.

In petitioner's case there is little room for complaint by the Government since "the indictment set forth the offense; the indictment was good and sufficient." *U. S.* v. *Rosenblaum*, 7 Cir., 176 2d 329, and *Gaunt* v. *U. S.*, 1 Cir. 184 F. 2d 284.

In the case of *Amendola* v. *U.S. (2nd Cir.)*, 17 F. 2d 529, Judge Learned Hand, speaking for the court said:

> "Even though the evidence justified a submission of the case to the jury, the question was not submitted to them in the colloquial charge of the judge, and we may be sure that they did not take it for themselves. The result is that the defendant was convicted without any determination by the jury as to the character of the transaction, on which his guilt in law depended under the indictment actually found. This was error in any view, and while a majority of us should not, as we have said, have raised it, if the result as a whole had been just, we think the sentence gives the defendant a substantial complaint, even against formal errors.
>
> It is true that the defendant is an old offender; (and could have subjected him to the maximum penalty)—but it did not in our view justify a single offense into two separate offenses by the mere contrivance of charging it in different ways . . . While we recognize, of course, that we have no power over the sentence, yet when the question arises as to whether the record clearly shows that there has been an unjust result, we will not ignore an error, which, except for the sentence, would not have justified a reversal. We cannot assent to the repetition of the charge with purely formal changes, as a device to double the penalty unless the whole trial was conducted with the most scrupulous exactness. Judgment reversed."

To confuse the issue even more, the Seventh Circuit in *U. S.* v. *Beck*, 118 F. 2d 178, ruled that "where one conspiracy was specifically charged, proof of different and disconnected ones would not sustain a conviction."

Yet, in your petitioner's case, Pat Russano, a co-defendant in C-151-226, but tried by another judge, had her conviction set aside by the Second Circuit (257 F. 2d 712) on the ground that the evidence (given in the main by Michael Botto, a paid informer who also testified against Carminati) established *two* conspiracies, one in 1952 and another in 1955-1956, resulting in prejudicial variance from indictment charging a single indictment.

It should be noted that in Pat Russano's case, the first case was under 151-226 and she was charged under count 14, the conspiracy count *to violate* the narcotic laws —the jury disagreed, and the government re-indicted her. In the language of Judge Waterman, C.J.—"* * * she was convicted upon an indictment filed August 14, 1957 which charged * * * the defendant conspired * * * with others * * * *to traffic in narcotics in violation of* 21 U.S.C.A. 173, 174, a change in the form of the indictment charging the very same crime of conspiracy, but this time making sure that the question raised in the instant case would not even see the light of day. For the District Court and the Court of Appeals in the Second Circuit to attempt to read into a law a new interpretation contrary to the Constitution is a novel way of upholding a conviction for conspiracy under Title 18-371.

Your petitioner asks this Court to agree with that decision which denounces a trial court's contrivance of a single charge of conspiracy under 18 U.S.C. sec. 371 into two offenses or two meanings so that that single 18-371 conspiracy can be punished as a conspiracy in violation of Title 21 U.S.C. secs. 173 and 174, instead of the conspiracy under which the petitioner was charged, indicted, tried and convicted. See also *Lindsey et al.* v. *State of Washington*, 301 U.S. 397, 57 S. Ct. 797.

There is a vast difference between statutes that charges one with a crime which is a crime unto itself, separate and distinct from the substantive crime described and which does not arise under the substantive statute at all and another statute, which by the inclusion of the magic words, "or conspires to",—attempts to raise the conspiracy contained in that substantive statute to the level of a substantive crime, by a mere contrivance or conclusion of the trial court when the indictment charging the alleged crime, the evidence, the instructions to the jury, the verdict and conviction all point to a conspiracy to violate the law(s) under 18-371.

To recapitulate,—aside from any further mention of the constitutionality of the Act involved regarding the method of creating and labeling an accused into becoming a second offender, the question of self-incrimination, the method of convicting a defendant of one crime but sentencing for a crime which he has not been indicted, tried or convicted of, and the method of charging a defendant by information for an infamous crime, after trial and conviction, in order to subject him to more severe sentences and punishments,—and the trial court's failure to observe Rule 32 (a) and preserve defendant's rights thereunder,—we now find that:

1. Judge Weinfeld sentenced petitioner to a ten year term of imprisonment under the Narcotics Control Act of 1956 as having conspired in violation of secs. 173 and 174 of Title 21, U.S.C. as amended on July 19, 1956, to violate sec. 174.

2. Judge Levet sentenced David Shackelford, another defendant in Carminati's case and charged with the same crime, to a two year term under sec. 7237(a) of Title 26, U.S.C.A.

3. Judge Palmieri sentenced Michael Botto, a confessed trafficker who had been indicted in two previous cases, but never tried, by virtue of a third indictment, to a two year unsupervised suspended sentence, for the same crime, under Title 18, sec. 371, U.S.C.

4. Judge Palmieri in *Ogull* v. *U.S.* (149 F. Supp. 272) ruled [illegible] where the time factor is of prime importance, he would and did give the jury the task of determining when the conspiracy ended or when the particular defendant withdrew from the crime charged, so that he would be able to know under what statute to sentence the defendant(s), claiming that if he took the task unto himself, he would be violating the defendants' constitutional rights in several respects.

5. In the *Bazzell* case, 187 F. 2d 878, supra, the court there approves of the procedure whereby the defendants can

be and should be tried and sentenced under 18-371, the general conspiracy statute if the defendants have so been charged, since Congress did not expressly repeal Title 18, sec. 371 when the special statutes were enacted into law.

6 In *Amendola* v. *U. S.*, 17 F. 2d 529, Judge Hand recites the reasons why the court there reversed the decision in that case indicating that one cannot justify a single offense into two separate offenses by the mere contrivance of charging it in different ways and thus devise a way to double or make the penalty more severe.

7 The jury in Carminati's case was expressly told that he was not being charged with violating Title 21 secs. 173 and 174; Title 26 secs. 4701, 4703, 4704(a), 4724(c) and 4771(a) but—"These are the laws which the Government charges the defendant conspired to violate • • • (and) This indictment is bottomed upon Section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy." (J.A. 10).

Therefore, when Carminati was found "guilty on Count [illegible]—he was found guilty of a single conspiracy,—guilty of violating Title 18—sec. 371 of the U.S. Code—the conspiracy statute,—and no thing else!

"*The conspiracy count against the four defendants* and the three substantive counts against Rich *are in some respects governed by different laws.*

It is almost always characterized by secrecy, rendering detection difficult and requiring much time for its discovery. Because of this, *a conspiracy to commit a crime is made by statute an entirely distinct offense, separate from the substantive crime itself. I shall later discuss the conspiracy and the substantive counts in detail.* (J.A. 9). "

III. Although the Trial Court Instructed the Jury to Determine Defendant's Guilt or Innocence Under "Old" Acts, and Having Obeyed the Instruction, the Jury Was Discharged Without Finding the Defendant Guilty of a Conspiracy in Violation of a Special Narcotic Law, Which Law Was Used as Authority By the Court, to the Defendant's Prejudice in Sentencing the Said Defendant

In the instant case, the court erred when it decided to invade the province of the jury—go behind that verdict,—by which it was bound, and by which Carminati was bound,—and by outright speculation as to what, the jury may have had in mind when it returned the verdict,—state that the evidence adduced upon the trial not only "conclusively proved" a conspiracy to violate the narcotic laws but it left no doubt that the hard core of the conspiracy was to violate section 174 of Title 21. The verdict of the jury must be read "guilty as charged in the indictment"; it cannot be interpreted as anything less." *Williams* v. *U.S.*, 5th Cir., 238 F. 2d 215, 219 (1956) cert. denied 352 U.S. 1024 (1957).

The trial court erred by imposing sentence on the defendant Carminati under Title 21 U.S.C. sec. 174 as amended by the Narcotic Control Act of 1956 rather than imposing sentence as authorized and required under Title 18:371 when the jury was expressly instructed:—

Title 18:371 when the jury was expressly instructed:—

> "• • • with respect to the defendant Carminati, as to whom the principal testimony was given by the witness Oglesby, and it made reference to four different incidents. If at the end of your review of all of the evidence you disbelieve Oglesby's testimony, that is, disbelieve in substance his statements made with respect to the defendant Carminati, then I will instruct you to find the defendant Carminati not guilty." —and all of his testimony consisted of matters relating to events prior to July 19, 1956—

In *Carminati et al. v. U.S.*, 2 Cir. 247 F. 2d 640, the Court of Appeals affirming the judgment of the court below in answer to petitioner's first appeal held,

> "Appellant(s) was convicted upon an indictment charging him with *a conspiracy in violation of 18 U.S.C. 371* to receive, possess, and sell heroin in violation of the federal narcotic laws. 21 U.S.C. 173, 174. 26 U.S.C. secs. 4701, 4703, 4704(a), 4724(a), 4771(a)."

Your Petitioner Anthony Carminati, believes that the decision of the District Court and the Court of Appeals is *res judicata*.

Yet, in *U.S. v. Carminati*, (281 F. 2d 908) petitioner's present appeal Judge Waterman writing for the court ruled that when such question arises " " it would be peculiarly inapposite where no defense has been offered that would rationally permit a verdict of guilty under the statute which imposes the lesser penalty either under 26-7237 (a) U.S.C. or Title 18-371 U.S.C. and that appellant would have the court believe that the jury could have been led to convict on a lesser quantum of evidence because Carminati would receive a lesser penalty under 18-371. "We certainly cannot attribute to the jury such improper conduct." "(Besides)—" " " such a conspiracy; if proven, constitutes in itself a violation of Title 21, sec. 174 U.S.C."

The panel's statement "apparently appellant(s) would

The panel's statement "apparently appellant(s) would have us believe that the jury could have been led to convict or a lesser quantum of evidence because appellant(s) would receive lesser penalties under 18 U.S.C. 371. We certainly cannot attribute to the jury any such improper conduct." is made without reason in the case, because it is clear that somewhere along the line the Appeals Court failed to read the brief or appendix to the brief filed by Carminati.

But see in re *U. S. v. Ogull, supra*, and the case of *Boyd v. U. S.*, 116 U.S. 616, 8 S. Ct. 524, on right of defendant to remain silent

He made no such statement! His argument was that since the trial court instructed the jury as it did, it had eliminated the question of guilt after July 19, 1956 and that if any guilt was established the sentence would have to reflect the law as it was prior to July 19, 1956, and that if 21-174 was applied for punishment purposes, the minimum sentence was *not* ten years, but only five, and under the indictment and evidence, the jury brought in a verdict under 18-371. And farther, if the court still insisted that the new Narcotics law controlled the sentence, since it had by his instructions eliminated any punishment under 21-174 (because the element of importation, illegally and knowingly, etc.) had not been proven, that the only sentence under the new act available to the court was either 18-371 or under 7237(a) with the minimum under that section being five years for a second offender, despite the further fact that Carminati resisted being called and designated a second offender on the basis of the indictment and the patent unconstitutionality of the statute involved wherein he was being labeled without being charged as required under the constitution and the Fed. Rules of Cr. P. (*U. S. v. Berkowitz*, 45 F. Supp. 564).*

The opinions in *Shelton* v. *U. S.*, 235 F. 2d 951, 954 (4th Cir., 1956), and *Rosenberg* v. *U. S.*, 346 U.S. 273, 303 (dissenting opinion of Frankfurter, J.), indicate that "the basis on which a jury convicts is authoritatively to be taken from what the judge tells the jury"—and "it cannot be said beyond a reasonable doubt what were the precise charges the jury had in mind in announcing its conclusions."

---

* * * * * In view of the foregoing authorities, and in the absence of contrary rulings, it should be held that under the (section involved) an imprisonment penalty cannot be imposed except in those cases where a second offense has not only been committed, but where the indictment or information charges the fact.

In *U. S.* v. *McElvain, et al.*, 272 U.S. 633, 47 S. Ct. 219, this Court held that "the crime of conspiracy to commit an offense is distinct from the crime itself," and in that case, which dealt with Internal Revenue statutes in particular, the opinion read: "The offense charged is a conspiracy and not arising under the internal revenue laws."

In *Hirsch* v. *U. S.*, 100 U.S. 33, *supra*, it was decided that an offense punishable under what is now 18-371, the conspiracy statute, that it is not a crime arising under the revenue (or narcotic?) laws, although the overt act necessary to be alleged affects the revenue of the United States. (See Legislative history report, regarding Narcotic Control Act of 1956, H.R. 11619, P. 11a appendix hereto, **"The Department of the Treasury is the principal Federal agency with responsibility for the enforcement of these (narcotic) laws. This responsibility arises from the fact that the Federal narcotic laws are revenue measures. * * *"**

The petitioner does not know how to make his plea for relief any stronger except to tell this Court that he does not seek a new trial or a redetermination of the facts. He does not now challenge the validity of the jury verdict of conviction or that the indictment in his case charged him with anything else but a conspiracy under 18-371. His position is simply that the only offense put to the jury, and by the instructions given, he was convicted of a conspiracy *to violate* under 18-371, five sections of Title 26 and two sections of Title 21 of the U.S.C. and the available sentences were not applied. The validity of his claim can be ascertained from an examination of his trial record without the necessity of any further factual inquiry outside the record. Cf. *Ladner* v. *U. S.*, 358 U.S. 169.

For this reason Carminati challenges the validity of the attempted connection between his case and the cited cases by the lower courts in their desire to continue to deny him his freedom.

IV. The Statute Under Which Defendant Was Sentenced Is Unconstitutional, Vague, Indefinite and Violates the V and VI Amendments and the Applicable Fed. Rules of Cr. Pro.

The proceedings outlined in the amended Narcotics Control Act for the presentation of an information to the sentencing court is made a foundation for increasing the punishment by judgment of the court without an indictment as required under the 5th amendment to the Const. of the U. S. and that is an action removing the cloak of protection which the constitution intended, and is an act prohibited under the aforesaid amendment.

Now, because, as your petitioner contends, Congress has written a vague, indefinite, incoherent law calling for two different punishments for a conspiracy to violate different sections of an act, if the sentencing judge chooses to apply different standards, and has included in that act a procedure that violates the Fifth Amendment to the Constitution by authorizing the court to deviate from the procedure demanded under Rules 7 and 8 of the F.R. of Cr. P. and the V and VI amendments to the Constitution, the various circuit and district courts all over the United States have contributed to the confusion that exists in this field of law and if there ever was a question that had to be settled once and for all, this is it.

The indictment did not charge Anthony Carminati with being a second offender under any of the Narcotic laws nor was he convicted as a second offender under the Narcotic laws,—yet Congress, in its desire to wipe out a nefarious business, in its zeal to protect the public, has enacted legislation that circumvents a Constitutional requirement by creating a method of conviction on a charge never made in the indictment and on a charge that the defendant has never been tried or convicted of and in a manner that does not give notice to or allow the defendant to prepare a proper defense as provided for under the V Amendment and Rules 7 & 8 of the Fed. R. of Cr. P.

Your petitioner does not argue with the aims or powers of Congress to control Commerce or pursue methods and means to enact into law methods that change procedures in the legal process but when it tampers with the rights of a defendant guaranteed him by the Bill of Rights and enacts a short cut abrogating the requirement that a felony be prosecuted in any other way than by an indictment found by a grand jury plus the other attendant steps to insure him a fair trial and due process, that resulting statute is illegal, unconstitutional and void.

The illegal sentence imposed on the defendant was not authorized by the common law record in the case, if we but examine the indictment, the plea, the verdict and the sentence. *U.S.* v. *Mauer*, 235 U.S. 55.

No error is claimed in the instructions given to the jury; reference is made merely to throw light on what offense the petitioner was tried for and convicted of. The sentence was *not* authorized. *U.S.* v. *Morgan*, 346 U.S. 502, *U.S.* v. *Bradford*, 194 F. 2d 197 (2 Cir.); *Cook* v. *U.S.*, 171 F. 2d 567 (C.A. 1); *Duggins* v. *U.S.*, 240 F. 2d 479 (C.A. 6); *Foushee* v. *U.S.*, 203 F. 2d 247 (C.A. 5).

Petitioner has been, or rather was under the impression, until re-reading the opinion of August 22, 1960, pertaining to his search for justice, that he was presumed to be innocent until proven guilty beyond every reasonable doubt and that he had a constitutional right not to be forced to testify against himself in order to prove his innocence. But, whose reasoning under law is correct or proper under the facts presented in your petitioner's case!

In the opinion in *Carminali's* case, the court refuses to recognize the fact that an accused is presumed to be innocent at every stage of the trial until he has been proven guilty beyond a reasonable doubt. Instead, the court insists that "it is peculiarly inapposite where no defense has been offered that would rationally permit a verdict of guilty under the statute which imposes the lesser penalty (here either under 27 sec. 7237(a) *or 18, sec. 371*)."

But see J. Palmieri's view on right of defendant to remain silent (footnote in re *U. S.* v. *Ogull*, *supra*, and the following case of *Boyd* v. *U. S.*, 116 U.S. 616, 8 S. Ct. 524, 532, where this Court said:

> "* * * It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust. * * * the information is in substance and effect a criminal one. A, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law (as provided for in Title 21 sec. 173) are of this quasi criminal nature, we think that they (the informations filed) are within the reason for all the purposes of the fourth amendment and that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself, and a demand being made upon him to admit to a previous conviction which if admitted, is to be used as the basis of an enhanced and more severe punishment under the amended specific sections of the narcotic laws (Secs. 7237 of Title 26 and secs. 173 and 174 of Title 21, U.S.C.A., is the equivalent of a violation within the meaning of the [illegible] is divested of many of the aggravating incidents, yet it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.

We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

There have been several decisions in the circuit and district courts sustaining the constitutionality of the law under consideration, (but) * * * It seems to us that these considerations fail to meet the most serious objections to the validity of the law. * * * We find nothing in the decisions to change our views in relation to the principal question at issue. **We think the law that authorized the procedure, is unconstitutional and void, and the admission in evidence of the information, was error and an unconstitutional proceedings.**

If the trial court has attempted, after more than three years to justify the imposition of the sentence under the 'new' statute based on the overt act of August 22, 1956, an incident discarded by both the court and the prosecution (see J.A. p. 16) then the law so construed and applied goes beyond the power to restrict abuses of freedom of speech and assembly and arbitrarily denies that freedom and the Fifth Amendment. *Herndon* v. *Lowry*, 57 S. Ct. 732, reversing *Lowry* v. *Herndon*, 186 S.E. 429, 182 Ga. 589.

See also *Lindsey et al.* v. *State of Washington*, 301 U.S. 397, 57 S. Ct. 797, in re application of ex post facto laws compared to and likened to the procedure and sentence imposed in Carminati case, which decided that:

> "It is plainly to the substantial disadvantage of petitioner to be deprived of an opportunity to receive a sentence which would give him freedom from custody and control prior to the expiration of the ten year term, a sentence which was the maximum under the old statute but now the minimum under one section of the new statute, plus the further disadvantage of being deprived of the benefits available under the parole provisions of the old statute." See also unanimous opinion of *Cole et al.* v. *State of Arkansas*, 333 U.S. 196, 68 S. Ct. 514, regarding conviction on a charge not indicted for or charged.

In *Ladner* v. *U.S.*, 79 S. Ct. 209, 358 U.S. 169, Justice Brennan speaking for the Court stated:

"when Congress has not explicitly stated what the unit of the offense is, the doubt will be judicially resolved in favor of lenity."

> "When choice has to be made between two readings of what Congress has made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definitive. We should not derive criminal outlawry from some ambiguous implication. (cases cited.) * * * And in *Bell* v. *U.S.*, the Court expressed its policy as follows:
>
> > "When Congress leaves to the Judiciary the task to imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. (cases cited.) This policy of lenity means that this Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. If Congress desires to create multiple offenses from a single act * * * Congress can make that meaning clear. * * * "

In *Gore* v. *U.S.*, 357 U.S. 386, *supra*, one of the cases cited in the *Ladner* case, it was said:

> "* * * It seems more daring than convincing to suggest that three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, each passed at three different periods, for each of which a separate punishment was declared by Congress, * * * that the defendant should be treated as though he committed only one of those offenses. This situation is different from the one that led to the decision of the Court in *Bell* v. *U.S.*, 75 S. Ct. 620."

In light of the statute (Narcotic Control Act of 1956) as it appears on the books now and in light of the previous statutes and the legislative history attached thereto, your petitioner claims that the doubt in his case was judicially resolved in favor of SEVERITY.

"In a case where a party is proceeded against for a second or third offense under the statute, and the sentence prescribed is different from the first by reason of its being a second or third offense, the fact thus relied on must be averred in the indictment. * * * But such averment does not charge an offense. * * * It is only the averment of a fact which will effect the punishment. The jury does not find the person guilty of the previous offense; they only find that he was previously convicted of it, as an historical fact. *Jacobs* v. *U.S.*, 24 F. 2d 890, 58 App. D.C. 62; see also *Jordan* v. *U.S. District Court for the District of Columbia*, 233 F. 2d. 362, 98 App. D.C. 160,—" * * * "On the other hand, where the aggravation arises from the manner in which the crime was committed, in substance a different aspect of the offense is sought to be punished. Accordingly, we think,—as did the Fifth Circuit in the *Meiers* case—that the facts in aggravation must be charged in the indictment must be charged in the indictment and found to be true by the jury." See also *In re Oliver*, 68 S. Ct. 499, 333 U.S. 257,—failure to afford petitioner reasonable opportunity to defend himself against a charge made by an officer of the court from records, was held to be a denial of due process. In *Chambers* v. *Florida*, 309 U.S. 227, 60 S. Ct. 472, 84 L. ed. 716,—"It is the law of the land that no man's life, liberty or property be forfeited as a punishment until there has been a charge *fairly* made and *fairly* tried in a public tribunal."

> "Even Congress, in the choice of means to effect a permissible regulation of commerce, must conform to 'due process.'" *Virginia Railway Company* v. *System Fed. #40*, 300 U.S. 515, 57 S. Ct. 592.

In the interest of justice, since the waters of justice have been polluted here and because this is a federal criminal case and because this Court has supervisory jurisdiction over the proceedings of the federal courts, "it is the duty of the Supreme Court to eliminate that pollution and remedy the situation at the earliest opportunity." *Mesarosh* v. *U. S.*, 352 U.S. 1, 77 S. Ct., 8.

In view of the confusion in the imposition of sentences on the various co-defendants under the various statutes, although indicted for the same offense, and in view of the divergent opinions held by the different district and courts of appeals in the circuits all over the country, in the interest of justice and consistent with the strict requirements of certainty and fairness in sentencing, a principle that has the approval of this Court, the cause ought to be returned to the district court with orders to resentence under the least severe statute, (either under Title 18-371, U.S.C.A. or under the statutes in effect prior to July 19, 1956.) *Townsend* v. *Burke*, 334 U.S. 736; *Nilva* v. *U.S.*, 352 U.S. 385; *Husty* v. *U.S.*, 282 U.S. 694.

Your petitioner Anthony Carminati believes and asks this Court to decide that a defendant should not be "constr ed" into jail, and claims that the Congressional intent as expounded in the Narcotic Control Act of 1956 and all the previous acts and statutes thereunder, the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, have construed, and your petitioner says incorrectly, as far as his case is concerned, the length, type and severity of a sentence to be imposed under an improp-

and severity of a sentence to be imposed under an improp-erly interpreted law.

"Has the price of liberty become so depressed and cheap that the courts which impose sentences are able to arrive at a decision by speculation?"

If that is so—then a new doctrine has been born—that a defendant can be "construed" into jail!

But, if our country is still guided, led and protected by the Constitution of the United States as interpreted by the Supreme Court, then he knows that justice will be done in his case.

CONCLUSION

Your petitioner has attempted to describe the errors committed by the trial court and compounded by the adamant affirmance of those errors by the Court of Appeals and believes that any one of those errors listed and discussed is sufficient in itself to warrant reversal of the conviction or the sentence in his case.

To repeat that "fundamental principles of liberty and justice have been disregarded" in the case of *U. S. v. Carminati* would perhaps, to this Court, seem trite and a phrase oft repeated at the close of a petition for a writ of certiorari, but it is comforting to know that the Supreme Court of the United States has never hesitated to exercise its jurisdiction and power to enforce the guaranty of Constitutional rights and to make "due process of law" and "equal justice under law" more than just a phrase in the Constitution and carved words on its home.

For all of the foregoing reasons set forth in the argument presented, Anthony Carminati is left to the mercy of the Supreme Court which has the power to strike down a conviction so full of violations of his constitutional rights, and is joined by his counsel who respectfully prays that this petition for certiorari be granted.

I. William Stemple
804 Warner Building
Washington 4, D.C.
Attorney for Petitioner